Unbelievable, Inc., d/b/a Frontier Hotel & Casino *and* Professional, Clerical and Miscellaneous Employees, Local 995, affiliated with International Brotherhood of Teamsters, AFL–CIO *and* International Union of Operating Engineers, Local 501, AFL–CIO. Cases 28–CA–10606, 28–CA–10651, 28–CA–10742, 28–CA–10650, and 28–CA–10757

August 30, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On May 28, 1992, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, cross-exceptions, and motion for reimbursement remedy, and the Charging Parties filed an opposition to the Respondent's exceptions and a motion for attorney fees and litigation expenses. The Respondent filed motions, which we deny, to strike the Charging Parties' opposition to the Respondent's exceptions and the Charging Parties' motion for attorney fees.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

The Charging Parties and the General Counsel seek reimbursement of fees and expenses related to this proceeding. The requested reimbursement order, as specified in the General Counsel's motion, encompasses the Charging Parties' negotiation and litigation expenses as well as the General Counsel's litigation expenses, including the costs of investigating the charges against the Respondent. We find that, in the circumstances of this case, such remedies will effectuate the policies of the Act, and we grant the General Counsel and Charging Parties' motions. The Respondent has engaged in egregious and deliberate surface bargaining with the Charging Parties, which has unnecessarily diminished their economic strength. Moreover, through its reliance on frivolous defenses in its litigation of these allegations, the Respondent has further depleted the Charging Parties' resources and needlessly wasted the resources of this Agency. We find that the Respondent's flagrant disregard for its obligations under the Act, as well as for the Board's processes, compels the conclusion that the extraordinary remedies requested, in addition to the usual bargaining order, are appropriate in order to compensate the Charging Parties and the General Counsel for their losses and to ensure meaningful negotiations pursuant to the Board's Order.

I. THE CHARGING PARTIES' NEGOTIATION EXPENSES

The judge found that the Respondent's conduct in negotiations with the Charging Parties constituted surface bargaining in violation of Section 8(a)(5) and (1) of the Act. We agree. In May 1990,[3] the Respondent engaged Attorney Joel Keiler to negotiate new labor agreements with the unions representing its employees, including Charging Parties Teamsters and Operating Engineers.[4] The judge found that Keiler's conduct even before negotiations with the Unions began was designed to set the stage for allegations that the Unions failed to meet and bargain. Specifically, long before the Respondent notified the Unions on July 24 that Keiler was authorized to represent it, Keiler contacted the Unions repeatedly, initiated the involvement of a Federal mediator to arrange negotiating sessions, and on June 27 submitted to both Unions proposals that included major departures from existing working conditions. The letters accompanying the proposals stated that the proposals would be implemented on August 1 unless the Unions contacted him.

Keiler's conduct at his bargaining sessions with the Unions reaffirms that he did not intend to reach agreements with them. As found by the judge, Keiler adopted a ''pugnacious and obstructive stance'' that would frustrate the efforts of any negotiator intent on conducting rational bargaining. Moreover, the Respondent's proposals were, as found by the judge, ''regressive and confrontational'' and ''not designed to reach agreement.'' The proposal to Operating Engineers, inter alia, cut the wages of most Operating Engineers-represented employees by approximately 5 percent, required unit employees to work 2000 hours in an anni-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The Respondent also contends that the judge's actions in this proceeding demonstrate bias against the Respondent. After a careful review of the record, we find that this allegation is without merit.

[2] In adopting the judge's finding that the allegations that the Respondent unlawfully discontinued its use of Charging Party Teamsters' exclusive hiring hall and failed to notify Teamsters of outside hires are not barred by Sec. 10(b), we note that the Respondent's witnesses testified that it ceased using the hiring hall in May or June 1990, and the charge was filed on November 5, 1990. Moreover, we agree with the judge that Teamsters could not reasonably have known of the change until shortly before it filed the charge because the change was made surreptiously and Teamsters was not notified of the new hires.

[3] All subsequent dates are 1990 unless otherwise indicated.

[4] At that time, the Operating Engineers unit was still working under the conditions of an agreement that had expired in 1987, and the Teamsters units operated under terms imposed by the Respondent in 1989 following impasse.

versary year in order to be eligible for holiday and vacation pay, eliminated the pension plan, and replaced the union health plan with two private plans. When Operating Engineers Representative Robert Fox Jr. told Keiler that the proposals were outlandish and that their only purpose was to generate a strike, Keiler replied that ''that's the way Tommy [Elardi, the Respondent's general manager] wanted it,'' and that ''he would be pleased to get rid of all the collective-bargaining agreements, that that was his purpose in getting such a—this kind of proposal.'' Similarly, the proposal presented to Teamsters eliminated the hiring hall, the daily and weekly guarantees, the business agents' visiting privileges, the stewards' privileges, and the pension plan. It also merged the two traditional Teamsters-represented units, excluded individuals whom the Respondent considered supervisors, and reduced laborers' wages from $11.92 per hour to $6.50 per hour. Keiler responded to Teamsters Secretary-Treasurer Richard Thomas' protest that the proposed holiday and vacation pay rule (the same as that presented to Operating Engineers) was ridiculous, stating, ''Tom don't care. Tom would like to have a strike anyway.'' Keiler repeated this refrain when Thomas rejected in turn the Respondent's proposals concerning discharges, pensions, and the hiring hall.

Keiler met with Operating Engineers on three occasions and with Teamsters on four occasions. Keiler refused to engage in meaningful discussion of any of the Unions' proposals and insisted on discussing only the Respondent's proposals which he declared would not be modified.

At his last meeting with Operating Engineers, Keiler did modify the Respondent's proposed holiday and vacation pay rule and returned to the Union's existing health and welfare plan. At that meeting, he also declared that the parties were at impasse. Fox asserted that the Respondent was not bargaining in good faith, and that there was no impasse but rather a move by the Respondent to force a strike. Keiler quoted Elardi as saying that if the Union did not want the Respondent's proposal it should strike, and that he would just as soon replace the engineers. The Respondent notified Operating Engineers that it would implement its proposal on December 1 and did in fact implement certain changes on that date, including wage reductions and the elimination of the pension plan.

Negotiations with Teamsters ended in much the same way. Thomas had presented the Respondent's proposal to the membership for a vote, as Keiler had requested, even though Thomas could not recommend its approval. Thomas informed Keiler that the members had rejected the proposal, and Keiler responded that if the proposal was not accepted by November 1, the Respondent would implement it. Thomas contended that the parties had not reached impasse. Following this meeting and its declaration of impasse, the Respondent notified Teamsters by letter that it was changing its proposal to continue contributing to the union health insurance plan. The Respondent did not reply to Thomas' request for another meeting and implemented its proposal on December 1.

We find, consistent with the judge's conclusion, that the Respondent engaged in deliberate and egregious bad-faith conduct aimed at frustrating the bargaining process. This conduct pervaded the entire course of bargaining, beginning even before the first negotiation session and continuing after the last. The Unions devoted their limited resources to their preparation for negotiations as well as the actual bargaining sessions with the Respondent, only to be met with the Respondent's flagrantly unlawful conduct. Thus, the Respondent caused the Unions to waste their resources in a futile effort to bargain for an agreement that the Respondent never intended to reach. In fact, Keiler lost no opportunity to goad the Unions to strike, at the same time promising that the Respondent would meet this action by replacing the striking employees. We find, as did the judge, that this conduct rendered the bargaining between the parties merely a charade.

In such circumstances, a bargaining order alone will not ensure meaningful bargaining, because it cannot restore the Unions to their positions prior to the futile negotiations. In fact, limiting the remedy to the conventional bargaining order would effectively permit the Respondent to benefit from its violations of the Act by ensuring bargaining with Unions that have been economically weakened by the Respondent's misconduct. Thus, in order to effectuate the policies of the Act, we must restore to the Unions some measure of the economic strength that they possessed when they initially entered the negotiations process with the Respondent.[5]

The Board has ordered the reimbursement of negotiating costs in past cases based on the egregiousness of the unlawful conduct. In *Harowe Servo Controls*, 250 NLRB 958 (1980), the employer made a number of unilateral changes soon after the union was certified and, after bargaining began, froze unit employees' wages while granting an increase to other employees; declared a deadlock in negotiations and made further changes beyond its last proposals; then, after an unfair labor practice strike had ended, the employer withdrew its proposals based on decreased support for the union.

[5] In this respect, the principle underlying the reimbursement of negotiating expenses in cases of extreme surface bargaining resembles the rationale for the limited backpay remedy ordered by the Board where employers have failed to provide unions with an opportunity to bargain about the effects of a cessation of operations. See *Transmarine Corp.*, 170 NLRB 389 (1968). In both instances, the employers, through their unlawful conduct, have diminished the bargaining strength of the unions, and the Board must employ extraordinary remedies to restore the unions' strength and thus ensure meaningful bargaining pursuant to the bargaining order.

The Board found that the employer ''embarked upon an unlawful course of conduct which was calculated to thwart the entire collective-bargaining process and forestall the possibility of the Respondent ever reaching agreement with the chosen representative of its employees.'' Id. at 964. The Board further found that the resources expended by the union in that case were wasted due to the employer's ''willful defiance of its statutory obligation.'' Id. at 965. In an earlier case, *M.F.A. Milling*, 170 NLRB 1079 (1968), the Board also found that the respondent had deliberately engaged in conduct designed to frustrate bargaining and to make negotiations a waste of time, and ordered the respondent to reimburse the employee-members of the union negotiating committee for wages lost while they attended bargaining sessions. In the present case, we reach the same conclusions as the Board did in *Harowe Servo* based on similarly egregious facts. We rely particularly on the undeniable causation between the Respondent's misconduct and the useless expenditure of the Unions' resources in their attempts to bargain.

The Board, however, has not consistently followed *Harowe Servo* in cases where the reimbursement of *negotiating* costs has been sought. In a number of cases, the Board has instead relied on the standard applicable to reimbursements of *litigation* costs to charging parties, i.e., whether the defenses raised by the respondent are ''frivolous rather than debatable.''[6] For example, in *M. A. Harrison Mfg. Co*., 253 NLRB 675 (1980), the employer asserted that the union had waived its right to bargain over changes implemented during negotiations because the union had neither agreed nor objected to the changes. The Board declined to order reimbursement of negotiating expenses as a remedy for the employer's bad-faith bargaining, finding that the defenses raised were clearly nonmeritorious but not so insubstantial as to be patently frivolous. Id. at 675 fn. 2; see also *Marriott In-Flite Services*, 258 NLRB 755 (1981). In *Wellman Industries*, 248 NLRB 325 (1980), the Board granted both negotiating and litigation expenses based on the respondent's frivolous defense for its refusal to bargain, but specifically noted that the reimbursement of negotiating costs was not limited to cases involving frivolous defenses, because those costs were not at issue in *Tiidee* and *Heck's*. Id. at 326.

In *Houston County Electric Cooperative*, 285 NLRB 1213 (1987), the Board again considered the reimbursement of litigation and negotiating costs together and applied a hybrid standard, finding that such expenses are warranted where the respondent's defenses are patently frivolous under *Tiidee* or where the respondent has engaged in a particularly egregious course of conduct to frustrate bargaining under *Harowe Servo*. Still another test was utilized in *Eastern Maine Medical Center*, 253 NLRB 224 (1980), where the Board denied reimbursement of negotiating expenses, as well as other extraordinary remedies for the employer's bad-faith bargaining, on the grounds that the employer had not demonstrated ''a proclivity to violate the Act once its actions have been adjudicated unlawful.'' Id. at 228.

The cases above illustrate the need for a clear and consistent approach to the reimbursement of negotiating costs as a remedy for unlawful bargaining conduct. As an initial matter, we emphasize that we do not intend to disturb the Board's long-established practice of relying on bargaining orders to remedy the vast majority of bad-faith bargaining violations. In most circumstances, such orders, accompanied by the usual cease-and-desist order and the posting of a notice, will suffice to induce a respondent to fulfill its statutory obligations. In cases of unusually aggravated misconduct, however, where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their ''effects cannot be eliminated by the application of traditional remedies,'' *NLRB v. Gissel Packing Co*., 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co*., 386 F.2d 562, 570 (4th Cir. 1967), an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. As noted above, this approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses. In contrast, we find little nexus between the presentation of a frivolous defense in litigation and the reimbursement of a charging party's *negotiation* costs, and we overrule *M. A. Harrison*, *Marriott In-Flite Services*, and similar cases to the extent that they apply the frivolous defense standard in this context.

Thus, because we have found that the effects of Respondent's surface bargaining cannot be eliminated by the application of traditional remedies, we amend the judge's recommended remedy to include the reimbursement of the negotiation expenses of both Charging Parties.[7]

[6] *Heck's, Inc*., 215 NLRB 765 (1974). See also *Tiidee Products*, 194 NLRB 1234 (1972). This standard is discussed in detail infra regarding the requests for reimbursement of litigation expenses in this case.

[7] Member Truesdale finds that the reimbursement of negotiating expenses is necessary here to restore the status quo and thus promote effective bargaining, where the Respondent has engaged in egregious and deliberate surface bargaining. He finds it unnecessary to address the issue of the broader application of this remedy to cases involving other unfair labor practices that may similarly frustrate the bargaining process.

II. LITIGATION EXPENSES

A. *The Respondent's Frivolous Defense*

Under the current standard as articulated in *Heck's*, the Board will order reimbursement of a charging party's litigation expenses only where the defenses raised by the respondent are ''frivolous'' rather than ''debatable.'' The Supreme Court anticipated the Board's reliance on this dichotomy in its remand of the Board's prior decision in that case,[8] and further noted that such a decision would be reasonable. *NLRB v. Food Store Employees Union Local 347*, 417 U.S. 1 (1974). In its decision on remand, the Board recognized the various and sometimes competing policy concerns on which the Board had based its decision not to order reimbursement in its earlier *Heck's* decision, and its decision to require such reimbursement in *Tiidee*. In *Heck's*, where the defenses presented were found not frivolous, the Board had cited, inter alia, the principles that Board orders must be remedial rather than punitive and that the public interest in allowing the charging party to recover its litigation costs does not override the principle that litigation costs are ordinarily not recoverable. 191 NLRB at 889. In response to the frivolous defenses in *Tiidee*, on the other hand, the Board had emphasized the importance of discouraging frivolous litigation, and declared that the policies of the Act ''can only be effectuated when speedy access to uncrowded Board and court dockets is available.'' 194 NLRB at 1236. Considering the cases together, the Board found no inconsistency in its approach and concluded that the opposite outcomes in the cases were appropriate. *Heck's*, 215 NLRB at 768.

Despite the Board's caution in *Heck's* that its determination in the context of the remand was limited to reconciling the two previous decisions rather than prescribing future remedial policy, that case continues to define the rule and underlying principles concerning reimbursement of litigation expenses. The Board has ordered reimbursement in a number of cases pursuant to the *Heck's* standard. For example, in *Wellman Industries*, supra, the respondent defended a refusal-to-bargain allegation by contending that it had no duty to bargain because the employees did not have the opportunity to vote on a union merger. The Board found the defense frivolous because the respondent's refusal to bargain had prevented the employees from being covered by a collective-bargaining agreement, which was necessary for eligibility to vote on the merger. Similarly, the Board ordered reimbursement of litigation costs in *Texas Super Foods*, 303 NLRB 209 (1991), finding frivolous the employer's continued defense of preelection conduct previously found objectionable.[9]

Consistent with the intent expressed in *Heck's*, the Board has found that most cases do not meet the restrictive standard prescribed there. *Heck's* indicates, for example, that a respondent's defenses will be considered debatable if they turn on issues of credibility, reasoning that parties should not be discouraged from seeking access to Board processes ''where the credibility of witnesses leaves an unfair labor practice issue in doubt.'' *Heck's*, 215 NLRB at 768. In *Workroom for Designers*, 274 NLRB 840 (1985), for example, the Board found flagrant violations of Section 8(a)(1) and (3) of the Act, but determined that the reimbursement of litigation costs was not warranted, in part because the merits of some allegations hinged on credibility.[10] In addition, the Board has denied reimbursement of litigation costs where some complaint allegations have been dismissed. Thus, in *Houston County Electric Cooperative*, supra, where the respondent had engaged in bad-faith bargaining and made unilateral changes without reaching impasse, the Board denied reimbursement of litigation costs on the grounds that its reversal of other 8(a)(5) findings demonstrated that at least some of the respondent's defenses were not frivolous.

In the present case, the Respondent's sole defense to the most serious complaint allegation of surface bargaining consisted of the testimony of Keiler, the Respondent's only negotiator and its counsel through most of this proceeding, until he withdrew and took the stand as the Respondent's last witness.[11] Although he provided some testimony on substantive matters relevant to the dispute, much of his testimony, particularly on cross-examination by counsel for the Charging Parties and the General Counsel, consisted of unresponsive, aggressive, and flagrantly disrespectful remarks. Besides illustrating his belligerent approach at the bargaining table, Keiler's testimony, substantial portions of which are excerpted in the judge's decision, convinced the judge that Keiler ''has rejected the concept that his conduct is subject to review under the Act.'' The judge concluded, and we agree, that Keiler ''has no credibility whatsoever. Even when he is testifying to matters not in serious dispute, one must mistrust him.'' His conduct as a witness demonstrates his intent to make a charade of this proceeding, just as he had of the collective-bargaining process in his dealings with the Unions.

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[8] *Heck's, Inc*., 191 NLRB 886 (1971).

[9] See also *C. F. Eckert, Inc*., 301 NLRB 868 (1991) (reimbursement of litigation costs ordered to remedy employer's failure to make benefit fund contributions in breach of non-Board settlement, where employer failed to make any defense beyond a denial of the allegations).

[10] See also *National Roof Systems*, 305 NLRB 965 (1991).

[11] The Respondent also asserted that it had no duty to bargain because the units were inappropriate due to the asserted inclusion of supervisors. However, the judge properly found, as he had in a previous proceeding involving the Respondent, that this defense was irrelevant to refusal-to-bargain allegations, and he declined to permit evidence on this issue.

We agree with the principle in *Heck's* that the necessity for evaluating the credibility of witnesses ordinarily renders a respondent's defense debatable rather than frivolous. However, we find that the Respondent's defense here, which depends on Keiler's testimony, presents no serious issue that can reasonably be characterized as debatable. The Board's statement in *Heck's* stemmed from a proper reluctance to penalize a party for its inability to ascertain the credibility of its witnesses or to predict how their demeanor may demonstrate credibility or a lack of it. Therefore, the Board expressed the view that until the credibility resolutions were made by the judge, the existence of an unfair labor practice would remain ''in doubt.'' Although this case required the judge to state credibility findings regarding the conflicts between Keiler's testimony and that of the union representatives, it is clear from the judge's decision that his assessment of Keiler's credibility presented no real issue and bears little resemblance to the kind of credibility resolution contemplated in *Heck's*. Instead, the defense here rests on the transparently untruthful testimony of an attorney whose words and demeanor demonstrated unmistakably that he was not to be believed.

Moreover, whereas the typical case involves the good-faith presentation of witnesses by counsel, the witness in this case was not only the Respondent's sole agent in bargaining, but was himself its counsel in preparing and presenting much of its case. Thus, Keiler was in the unusual position of being able to determine from personal knowledge that the Respondent's defense lacked credibility as well as merit.

The policies advanced by *Tiidee* and its progeny cannot be protected if the Board deems ''debatable'' any and all defenses offered by a respondent—no matter how hollow or unbelievable. While we must exercise appropriate caution in finding factual or credibility based defenses to be frivolous, neither should we effectively hold that such defenses can never be so. Each allegation of a frivolously maintained defense must be evaluated in its particular context. We believe that this approach is fully consistent with the principles relied on in *Heck's*, because it does not discourage access to the Board's processes in any case where debatable issues, including genuine issues of crediblity, exist. To the extent that *Heck's* may be interpreted as precluding the reimbursement of litigation expenses even where only pro forma credibility resolutions are made, we modify that policy to make clear that the Board may find a respondent's defense frivolous and order reimbursement of litigation expenses where, as here, the defense relies on testimony that presents no legitimate issue of credibility. In such exceptional circumstances, reimbursement of these costs effectuates the policies of the Act by keeping the Board's docket available for meritorious cases and by compensating charging parties and the General Counsel for their needless expenditures caused by the respondent's adherence to a clearly meritless defense.[12]

We recognize that this proceeding involved other allegations in addition to surface bargaining. We have adopted the judge's findings that the Respondent unlawfully implemented unilateral changes in working conditions and discriminatorily laid off and discharged employee Coleman. The judge rejected the Respondent's defense that the unilateral change allegations were barred by Section 10(b) in view of the surreptitious implementation of the changes. With respect to Coleman's discharge, the Respondent contended that it based its action on his performance (although its witness could cite no deficiencies) and that it was entitled to implement changes in the layoff procedure to permit the layoff of the most senior engineer, because the parties had reached impasse. In view of our findings above concerning the Respondent's surface bargaining, it is abundantly clear that any defense predicated on the existence of impasse is at the very least nonmeritorious. We also agree with the judge's dismissal of two relatively minor complaint allegations: that the Respondent refused to provide information, which the judge found was sought in preparation for the present litigation, and that the Respondent unlawfully withdrew its health insurance proposal to Teamsters in favor of retaining the current Teamsters plan at greater expense to employees.

We find that the presence of these additional allegations is insufficient to defeat the Charging Parties and General Counsel's motions for reimbursement of litigation expenses. While we do not pass on the particular merits of any case previously decided by the Board, we disagree with the blanket notion that the assertion of a debatable defense concerning *any* complaint allegation, or even the dismissal of an allegation, necessarily elevates the respondent's defense to the level that it may appropriately be characterized as debatable. Indeed, in any consolidated proceeding such as this, there will be a variety of alleged violations, and some may be withdrawn or found lacking in merit. Limiting the award of litigation costs to only cases undiluted by other issues, however, would strongly encourage separate litigation of alleged unfair labor practices, which clearly would not be an efficient use of the Board's resources. Moreover, in the circumstances of this case, the Respondent's surface bargaining significantly overshadows the other allegations and dominated the litiga-

[12] Cf. *Autoprod, Inc.*, 265 NLRB 331 (1982). In that case, the Board ordered the respondent to reimburse the General Counsel's expenses, citing the respondent's frivolous defenses, which ''wantonly and unnecessarily'' forced litigation on the Board. The Board also relied on the respondent's long history of intransigence, which is not present in this case. We find, however, that such a history is not a necessary antecedent to ordering reimbursement based on frivolous defenses.

tion of the complaint. Therefore, we find that an award of full litigation costs to the Charging Parties and the General Counsel is appropriate.

B. *The Nature of the Underlying Conduct*

In addition to the frivolous defense asserted by the Respondent, we find that the egregiousness of the Respondent's surface bargaining conduct constitutes a further basis for requiring reimbursement of the Unions' litigation expenses. We have already described Keiler's flagrantly unlawful course of conduct as the Respondent's agent in negotiations with the Unions. This approach to bargaining left the Unions no choice but to assert their statutory rights through litigation at the Board. In these circumstances, the losses sustained by the Unions in the preparation and conduct of the negotiations were compounded by the further expense of litigating in order to obtain the opportunity for good-faith bargaining to which they are statutorily entitled. We find that in particularly extreme unfair labor practice cases such as this, where a respondent has engaged in ''flagrant, aggravated, persistent, and pervasive misconduct,''[13] even a bargaining order accompanied by reimbursement of the charging party's negotiation expenses is insufficient to restore a charging party's economic strength and to ensure meaningful bargaining. We believe that in such cases we can best effectuate the policies of the Act by making the charging party whole for these losses. Therefore, we find that where, as here, the respondent's surface bargaining conduct is flagrant, aggravated, persistent, and pervasive, the appropriate remedy includes the reimbursement of both the negotiation and litigation costs of the charging party.

C. *The American Rule*

Requiring the Respondent to reimburse the Unions and the General Counsel for their litigation costs in the circumstances described above is consistent with the American Rule regarding attorney's fees as applied by the Federal courts. In *Summit Valley Industries v. Carpenters Local 112*, 456 U.S. 717 (1982), the Supreme Court cited this rule providing that attorney's fees ''are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor,''[14] and found that attorney's fees incurred in prior Board proceedings are not among the damages recoverable under Section 303 of the Labor Management Relations Act. Initially, the Court recognized several equitable exceptions to the rule, including the bad-faith exception discussed further below, but found none applicable to that case. Next, the Court considered whether Section 303 provided for the recovery of attorney's fees by reviewing both its language and its legislative history. The Court determined that the statutory provision allowing the plaintiff to ''recover the damages by him sustained and the cost of the suit'' did not grant specific authorization for the courts to award attorney's fees, and that both the ordinary meaning of the term ''damages'' and the presumption under the American Rule excluded fees. Regarding its examination of the legislative history of Section 303, the Court stated:

> [T]he little discussion pertaining to the scope of an employer's recovery under § 303(b) indicates that Congress did not intend to expand the term ''damages'' to include attorney's fees. The following colloquy between Senator Taft and Senator Morse is particularly instructive. In response to Senator Morse's suggestion that § 303(b) would impose virtually unlimited liability on unions, Senator Taft stated: ''Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorney's fees. In this case *we simply provide for the amount of the actual damages*.'' 93 Cong. Rec. 4872–4873 (1947) (emphasis added). We find these remarks persuasive evidence that Congress did not intend attorney's fees which were expended to stop a union from engaging in illegal activity to be recovered as ''damages'' under § 303(b).

456 U.S. at 723.

In contrast to Section 303, an examination of Section 10(c) of the Act and its legislative history leads to the conclusion that Congress intended to grant the Board extensive remedial authority, which may in appropriate cases include the reimbursement of attorney's fees. Section 10(c) states in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . .

The policies of the Act, as enumerated in Section 1, are:

[13] These terms were used by the Fourth Circuit to describe the employer's conduct in *J. P. Stevens & Co. v. NLRB*, 668 F.2d 767, 777 (1982), remanded 458 U.S. 1118 (1982). In that case, the Fourth Circuit adopted the Board's finding that reimbursement of litigation costs was warranted based on the employer's course of conduct over several Board and court proceedings. Although the facts of the instant case are distinguishable, we find that the language employed by the court aptly expresses the exceptional degree of unlawful conduct necessary for such a reimbursement remedy to be found appropriate.

[14] Id. at 721, quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

> to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Therefore, although Section 10(c), like Section 303, does not specifically address the Board's authority to order reimbursement of attorney's fees, it stands in stark contrast to Section 303 in that it refrains from particularizing the scope of the Board's remedial powers and, by its plain meaning, contemplates the exercise of broad discretion by the Board in fashioning a range of remedies suitable to remedy various unfair labor practices, as long as they ''effectuate the policies of the Act.'' We have found above that our Order in this case meets that statutory standard.

Moreover, whereas the Supreme Court in *Summit Valley* relied heavily on the unmistakable expression in the legislative history of Section 303 that Congress did not intend to include attorney's fees within the scope of recoverable damages, the legislative history of the Act contains no hint of an intention to circumscribe the remedial authority of the Board. Even though some early bills preceding the passage of the 1935 Act enumerated some of the specific types of remedies available to the Board, they also consistently included broad provisions authorizing the Board to exercise discretion in this area. The original Senate print of S. 2926 provided, ''The order may require such person to cease and desist from such unfair labor practice, or to take affirmative action, or to pay damages, or to reinstate employees, or to perform any other acts that will achieve substantial justice under the circumstances.''[15] The original Senate print of S. 1958 modified that language to provide that the Board would issue an order ''requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including restitution, as will effectuate the policies of the Act.''[16] In comparing S. 2926 and S. 1958, the Senate Labor Committee expressed its preferences for the phrase ''effectuate the policies of this Act'' because it referred directly to Section 1, and for the general term ''restitution,'' noting that an ''effort to substitute express language such as reinstatement, back pay, etc., necessarily results in narrowing the definition of restitution, which may include many other forms of action.''[17] Although the final bill in fact substituted ''reinstatement of employees with or without back pay'' for ''restitution,'' the change was made without any suggestion of an intention to narrow the discretion of the Board in remedial matters. In the 1947 amendments, Congress left unaltered the statutory language concerning the Board's remedial authority.

The Supreme Court has recognized that Congress granted the Board wide discretion concerning remedies. In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941), the Court stated, ''Nor could [Congress] define the whole gamut of remedies to effectuate these policies [of the Act] in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.'' In *Virginia Electric Co. v. NLRB*, 319 U.S. 533, 539 (1943), the Court found that the Board could properly order an employer to reimburse employees for dues withheld from their wages and paid to an employer-dominated union, stating:

> Within this limit [prescribed by Section 10(c) and Section 1 of the Act] the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without backpay. [Citing *Phelps Dodge*.] The particular means by which the effects of unfair labor practices are to be expunged are matters ''for the Board not the courts to determine.'' *I. A. of M. v. Labor Board*, [311 U.S. 72] at 82.

Conversely, in *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940), the Court held that the Board lacked authority to order the employer to deduct from the discriminatees' backpay the amounts they had earned on work relief projects and to pay those amounts to the appropriate government agencies, because the Board's order was devised to further public policies other than those articulated in the Act.

In remanding *Heck's*, the Court again acknowledged the legislative intent to leave remedies to the special competence of the Board in deciding that the D.C. Circuit had erred in enlarging the Board's order to include litigation costs without first remanding to the Board.[18] Moreover, in that case, although the Court found ''facial inconsistencies'' between *Heck's* and *Tiidee*, it noted that the Board may have perceived legitimate distinctions between the cases and did not hint that an

[15] S. 2926, Original Senate Print, 73d Cong., 2d Sess., reprinted in 1 Legislative History of the National Labor Relations Act (Leg. Hist.), 1935, pp. 6–7.

[16] S. 1958, Original Senate Print, 74th Cong., 1st Sess., reprinted in 1 Leg. Hist. 1302 (1935).

[17] Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress), Senate Committee Print, reprinted in 1 Leg. Hist. 1360 (1935).

[18] *NLRB v. Food Store Employees Union*, 417 U.S. 1 (1974).

award of litigation costs was beyond the power of the Board. Similarly, the Court's remand of *J. P. Stevens* for further consideration in light of *Summit Valley* demonstrates the Court's reluctance to disturb a Board order without seeking further rationale. Interpreting the remand as indicating a belief that *Summit Valley* precluded the reimbursement of litigation costs by the Board is purely speculative.

The other policy concerns raised by the Court in *Summit Valley* do not conflict with our decision to grant reimbursement of litigation costs here. For example, the Court noted that a party should not be penalized for prosecuting or defending a lawsuit. The Board's policy of ordering reimbursement where a respondent's defenses are frivolous is certainly in accord with this principle, because we find it untenable that the Court intended to protect a party's choice to engage in truly frivolous litigation. Neither do we dispute the Court's finding that recovery of attorney's fees is not a necessary element of a make-whole remedy. We fully recognize the extraordinary nature of this remedy and, under the policy articulated in this case, we reserve it for cases involving frivolous defenses and the most serious unfair labor practices.[19] In these cases, however, we are convinced that such a remedy is necessary to effectuate the policies of the Act.

Moreover, the Supreme Court has recognized that the American Rule is not absolute, and that in certain exceptional cases an award of attorney's fees is appropriate, even in the absence of a legislative grant of authority, where ''overriding considerations indicate the need for such a recovery.'' *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391–392 (1970). Among these equitable exceptions is the bad-faith exception, under which ''attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'' *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974). The Court held in *Vaughan v. Atkinson*, 369 U.S. 527 (1962), for example, where a seaman brought a suit to recover payments for maintenance and cure of tuberculosis, that an award of attorney's fees was warranted because of the employer's ''willful and persistent default in maintenance payments.'' Id. at 531. The Court reasoned that the employer's conduct ''forced [the seaman] to hire a lawyer and go to court to get what was plainly owed him.'' Id.

In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), the Court acknowledged that the bad faith required by the exception ''may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation.''[20] In fact, in *Vaughan*, supra, it was the underlying conduct, i.e., the ''willful and persistent default in maintenance payments,'' which led the Court to conclude that the defendant had acted in bad faith, entitling the plaintiff seaman to recovery of his attorney's fees. Despite this plain indication by the Court, there is some conflict among the courts of appeals concerning whether the bad-faith exception applies, as the Supreme Court suggested in *Roadway Express*, to bad faith in the conduct underlying the lawsuit as well as to bad faith pertaining to the litigation. Compare *Richardson v. Communications Workers*, 530 F.2d 126 (8th Cir. 1976), cert. denied 429 U.S. 824 (1976) (exception encompasses bad faith in underlying conduct) with *Shimman v. Operating Engineers Local 18*, 744 F.2d 1226, 1230 (6th Cir. 1984) (exception applies only to bad faith in the conduct of the litigation). We believe that the Supreme Court's repeated inclusion of both aspects of bad faith in its articulation of the exception warrants the conclusion that it contemplates that the exception will be applied in that manner.

In ordering the reimbursement of the litigation costs of the Unions and the General Counsel, including attorney's fees, we have already found that the Respondent demonstrated egregious bad faith—in the surface bargaining conduct giving rise to the unfair labor practice allegations, in its adherence to frivolous defenses, which necessitated the litigation of those allegations, and in the presentation of those defenses through the testimony of Keiler. Like the seaman in *Vaughan*, the Unions and the General Counsel were forced to litigate so that the Unions could obtain ''what was plainly owed'' them, that is, their right under the Act to bargain with the Respondent as the representatives of unit employees. Therefore, we find ample support for our conclusion that our Order is fully consistent not only with the American Rule, but alternatively with the bad-faith exception to that rule.

Based on the above conclusions, we amend the recommended remedy further to include the reimbursement of the reasonable litigation expenses of the Charging Parties as well as the General Counsel.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Unbelievable, Inc., d/b/a Frontier Hotel & Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

[19] Member Truesdale agrees with his colleagues that the egregious surface bargaining on the part of the Respondent in this case clearly warrants the award of litigation costs to the Union. However, he finds it unnecessary to address the application of this extradordinary remedy in future cases involving other equally serious unfair labor practices.

[20] 447 U.S. at 766 (quoting *Hall v. Cole*, 412 U.S. 1, 15 (1973)).

1. Add the following as paragraph 2(f) and reletter the subsequent paragraphs.

''(f) Pay to the Teamsters, the IUOE, and the General Counsel the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of this proceeding, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses, all such costs to be determined at the compliance stage of this proceeding. In addition, pay to the Teamsters and the IUOE the costs and expenses incurred by them in the preparation and conduct of collective-bargaining negotiations subsequent to June 27, 1990, such costs and expenses to be determined at the compliance stage of this proceeding.''

2. Substitute the attached notices for those of the administrative law judge.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to bargain in good faith with International Union of Operating Engineers, Local 501, AFL–CIO as the exclusive collective-bargaining representative of our engineering department employees.

WE WILL NOT enter into negotiations without any intent to reach a collective-bargaining contract with Local 501; WE WILL NOT have a closed mind regarding what subject matters should be included in a collective-bargaining contract; and WE WILL NOT present that Union with proposals which are intended to cause a strike.

WE WILL NOT make unilateral changes in the wages, hours, and other terms and conditions of employment of employees in the bargaining units represented by Local 501 such as:

> Implementing proposals at times when a lawful impasse has not been reached.
>
> Creating new job classifications to perform work normally done by bargaining unit employees.
>
> Rejecting the concept of seniority as described in the expired collective bargaining agreement between us and Local 501 in circumstances where no impasse has been reached.

WE WILL NOT discharge employees without regard to their seniority rights as set forth in the expired collective-bargaining contract between us and Local 501 governing preference for selection for layoff.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting or acting on behalf of International Union of Operating Engineers, Local 501, AFL–CIO or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL restore the wages and working conditions which were in effect prior to December 1, 1990 (unless the current wages exceed those then in effect, in which case we will not reduce any wage rate).

WE WILL, on request, bargain in good faith with International Union of Operating Engineers, Local 501, AFL–CIO as the exclusive representative of the employees in the bargaining unit described in the 1983–1987 collective-bargaining contract concerning wages, hours, and terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL make whole those employees who suffered wage losses (including holiday and vacation pay, if any) and pension losses resulting from our unlawful unilateral changes, with interest.

WE WILL offer James E. Coleman immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges he previously enjoyed, and make him whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against him.

WE WILL remove from our files any reference to the unlawful discharge of James E. Coleman and notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL pay to the International Union of Operating Engineers, Local 501, AFL–CIO and to the General Counsel of the National Labor Relations Board the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of this proceeding, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses, all such costs to be determined at the compliance stage of this proceeding. In addition,

WE WILL pay to the IUOE the costs and expenses incurred by them in the preparation and conduct of collective-bargaining negotiations subsequent to June 27, 1990, such costs and expenses to be determined at the compliance stage of this proceeding.

UNBELIEVABLE, INC., D/B/A FRONTIER HOTEL & CASINO

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to bargain in good faith with Professional, Clerical and Miscellaneous Employees, Local 995, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of our ''Front End'' and ''Back End'' employees.

WE WILL NOT enter into negotiations without any intent to reach a collective-bargaining contract with Local 995; WE WILL NOT have a closed mind regarding what subject matters should be included in a collective-bargaining contract; and WE WILL NOT present that Union with proposals which are intended to cause a strike.

WE WILL NOT make unilateral changes in the wages, hours, and other terms and conditions of employment of employees in the bargaining units represented by Local 995 such as:

Abandoning our obligatory use of Local 995's hiring hall and the rules associated with it, such as giving notice to it that individuals have been secured from another source.

Implementing proposals at times when a lawful impasse has not been reached.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL restore the wages and working conditions which were in effect prior to December 1, 1990 (unless the current wages exceed those then in effect, in which case we will not reduce any wage rate).

WE WILL, on request, bargain in good faith with Professional, Clerical and Miscellaneous Employees, Local 995, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of the employees in the ''Front End'' and ''Back End'' bargaining units described in our 1983–1987 collective-bargaining contracts concerning wages, hours, and terms and conditions of employment and, if understandings are reached, embody those understandings in a signed agreement.

WE WILL make whole those employees, together with interest, who suffered wage losses (including holiday and vacation pay, if any) and pension losses resulting from our unlawful unilateral changes.

WE WILL pay to the Professional, Clerical and Miscellaneous Employees, Local 995, affiliated with International Brotherhood of Teamsters, AFL–CIO, and to the General Counsel of the National Labor Relations Board the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of this proceeding, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses, all such costs to be determined at the compliance stage of this proceeding. In addition, WE WILL pay to the Teamsters the costs and expenses incurred by them in the preparation and conduct of collective-bargaining negotiations subsequent to June 27, 1990, such costs and expenses to be determined at the compliance stage of this proceeding.

UNBELIEVABLE, INC., D/B/A FRONTIER HOTEL & CASINO

Lewis S. Harris, Esq., for the General Counsel.
Alan D. Keiler, Esq. (Ammerman & Keiler), of Washington, D.C., for the Respondent.
Gerald Goldman, Esq. and *Adam N. Stern (Levy, Goldman & Levy)*, of Los Angeles, California, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Las Vegas, Nevada, on May 8,[1] September 24–26, and October 1 and 3, 1991, on complaints issued by the Regional Director for Region 28 of the National Labor Relations Board. The complaints are based on unfair labor practice charges filed by Professional, Clerical and Miscellaneous Employees, Local 995, affiliated with Inter-

[1] The hearing was delayed, inter alia, when it became necessary for the General Counsel to enforce a subpoena.

national Brotherhood of Teamsters, AFL–CIO (the Teamsters) and International Union of Operating Engineers, Local 501, AFL–CIO (the IUOE) on various dates beginning November 8, 1989. On the General Counsel's motion of May 8, 1991, the Teamsters cases and the first IUOE case were consolidated for hearing. The second IUOE case was added during a lengthy hiatus. Together, all these complaints allege that Unbelievable, Inc., d/b/a Frontier Hotel & Casino (Respondent or the Hotel) has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

Issues

The principal issue to be decided is whether Respondent engaged in a pattern of bargaining designed to frustrate the negotiation of a new collective-bargaining contract, i.e., ''surface bargaining.'' Indeed, the complaints allege Respondent's practice to have been ''confrontational'' bargaining intended to trigger a strike so that the strikers could be replaced and the unions ousted as the representatives of the employees in the three bargaining units. Other issues are whether Respondent implemented proposals without having reached a lawful impasse and whether it discharged the IUOE union steward either because of his union activities or as the victim of an unlawful unilateral change which deprived him of the protection of the seniority practice found in the expired collective-bargaining contract. Subsidiary to these issues are an alleged unlawful refusal to supply the Teamsters with certain information regarding newly hired employees.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. The Charging Parties and Respondent have filed briefs which have been carefully considered. Due to illness, the General Counsel did not file a brief, but did file a short letter explaining the circumstances and asserting the entire matter hinged upon the lack of credibility of Respondent's bargainer, Joel I. Keiler.[2] Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Unbelievable, Inc., d/b/a Frontier Hotel & Casino, a Nevada corporation, operates a hotel and gaming casino at its facility in Las Vegas, where its annual gross revenue exceeds $500,000 and it annually purchases and receives goods in interstate commerce valued in excess of $50,000. Accordingly, Respondent admits and I find it to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[2] Attorney Joel I. Keiler, of Reston, Virginia, served as Respondent's sole negotiator beginning sometime in May 1990. He had replaced Kevin Efroymson, a Las Vegas labor lawyer who had previously represented Respondent. Joel I. Keiler continued to represent Respondent throughout most of the proceedings before the Board, although he was aware that he would need to testify. As Respondent's last witness, he withdrew as trial counsel. His partner (and brother), Alan D. Keiler, of Washington, D.C., was substituted.

II. LABOR ORGANIZATION

Respondent admits that both the Teamsters and the IUOE are labor organizations within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is a hotel and casino located on the ''Strip'' in Las Vegas. Until 1988 it was owned by the Summa Corporation. That year it was sold to Respondent, which specifically recognized the Unions and adopted the then current working conditions as set forth in the three expired collective-bargaining contracts. Summa had had collective-bargaining agreements with a number of unions, including the Charging Parties, covering many different bargaining units. The Teamsters actually had two agreements, the ''Front End'' and the ''Back End'' contracts. Without listing all the classifications, the ''Front End'' contract covered business office employees such as night auditors, cashiers, reservationists, room clerks, and telephone operators. The ''Back End'' classifications included employees whose duties were mainly outside the hotel building, such as parking lot attendants, tram drivers, gardeners, laborers, and warehousemen. The two most recent collective-bargaining agreements between the Hotel and the Teamsters had expired on April 1, 1987. They were in the process of negotiating a new agreement when the business was sold to Respondent in 1988.

The IUOE represents a bargaining unit of individuals employed in the Hotel's engineering department. These individuals perform repair work including light plumbing, air-conditioning, and electrical tasks. They operate the building's boilers, refrigeration units, and power generators and also maintain them. That Union's most recent contract, like the Teamsters', expired in 1987 and was in the process of renegotiation when the business was sold.

Insofar as the Teamsters units were concerned, Respondent operated under the terms of the expired contract until April 25, 1989, when it imposed new terms on those two units. These were contract proposals made by Attorney Efroymson. The parties appear to concede that that implementation established the wages, hours, and terms and conditions of employment for the Teamsters units which were in effect until December 1, 1990. The Efroymson implementation is not the subject of the complaints; all agree that those conditions were properly established in an effort to break the longstanding impasse which the parties had encountered after the contracts expired in 1987.

With respect to the IUOE unit, although Efroymson proposed a contract in late 1988, the IUOE never accepted it nor did Respondent implement its terms. Therefore, the IUOE unit continued to operate under the terms of the 1983–1987 agreement, albeit as a matter of law, not a matter of contract.[3]

In May 1990, Respondent obtained the services of Attorney Joel I. Keiler. He testified that Respondent's general manager, Tom Elardi, gave him instructions to obtain new contracts with the various unions, including the two Charging

[3] See Sec. 8(d) of the Act.

Parties.[4] Keiler's conduct is the focus of all the allegations made against Respondent, except for the discharge of IUOE Steward James E. Coleman.

In general, the complaints assert that Respondent has, through Keiler's actions, engaged in bad-faith bargaining. The General Counsel contends that the implementation of the Keiler proposals was not privileged by any good-faith impasse which the parties may have experienced, but was part of a plan to either undermine these unions' representative status or to oust them altogether. That plan included Respondent's daring them to strike. The scheme must also have included the risk of litigation and a decision that the passage of time which any litigation would entail was a benefit, rather than a liability.

Specifically, Respondent's bad-faith conduct is alleged to include:

Teamsters unit:

—A May 1990 repudiation of the hiring hall and refusal to advise the union of direct hires.
—Regressive and confrontational bargaining tactics.
—A general refusal to consider any proposals other than its own.
—Implementing its proposal on December 1, 1990; after learning that the Teamsters health plan was in financial difficulty, withdrawing its own health proposal and main taining the Teamsters plan.

IUOE unit:

—Regressive and confrontational bargaining tactics.
—A general refusal to consider any proposals other than its own.
—Implementing its proposal on December 1, 1990.

Other issues:

—The discharge of steward Coleman.
—The unilateral creation of the multipurpose employee who performed tasks traditionally done by IUOE bargaining unit members.
—The refusal to provide the Teamsters with certain infor mation regarding newly hired employees.

B. *Preliminary Observation Regarding Respondent's Defense that the Bargaining Units are Inappropriate*

At the outset, both in this case as well as the previous case covering the restaurant and hotel workers, Respondent has consistently, and persistently, maintained that because the bargaining unit found in the expired contract covered statutory supervisors that it is an inappropriate unit. That circumstance, it further argues, allows it to decline to bargain with the unions until such time as the bargaining units are rendered appropriate. During the hearing it regularly sought to adduce evidence that certain job classifications covered by the expired contract were supervisory in nature. As in the previous case, I declined to hear evidence on the point, regarding the issue as not relevant to the proceedings as framed by the complaint. I nonetheless, repeat what I said there.

The bargaining units extant at the time the alleged unlawful unilateral changes were imposed were those set forth in the expired collective-bargaining contracts, units which Respondent voluntarily adopted when it purchased the hotel and casino. The Board has said in such circumstances, *Chemetron Corp*., 258 NLRB 1202, 1203 (1981):[5]

> Having voluntarily recognized and bargained with the Union as the collective-bargaining representative of a unit composed of [individuals who alone would not have constituted an appropriate unit under Sec. 9], Respondent argued for the first time at the hearing that the unit is inappropriate because the employees lack a distinct community of interest. We reject this belated attempt to repudiate the voluntary recognition. [Footnote omitted.] A contrary holding would fly in the face of our statutory obligation to promote stability in bargaining relationships.

See also *Arizona Electric Power Cooperative*, 250 NLRB 1132, 1133 (1980), cited in *Chemetron*. There, the employer argued that it had no duty to bargain because the unit included a statutory supervisor and was therefore inappropriate. That supervisor (the lead load dispatcher) had not been included in the certified unit, but was subsequently added to it by agreement of the parties during negotiations for a collective-bargaining agreement. In that case the respondent was ordered to recognize and bargain with the union.

Clearly, the Board will not permit the disruption of an otherwise stable bargaining relationship through the unilateral declaration by an employer that because the Board would not have initially certified the unit, it has no obligation to bargain in it where bargaining has been successful for many years.[6] It is quite obvious that the Frontier Hotel & Casino has bargained with the Unions in the units described by the expired contracts for many years and for many contract terms. Indeed, Respondent found the units sufficiently appropriate when it adopted them on the purchase of the facility. Moreover, since my decision in the earlier case, the Ninth Circuit Court of Appeals has agreed that the defense at this stage is ''wholly irrelevant.'' See the court's decision in *E. G. & H. Inc. v. NLRB*, 949 F.2d 276 (9th Cir. 1991), enfg. 296 NLRB 918 (1989).

This, of course, does not mean that Respondent cannot seek to modify the collective-bargaining unit to comport with the statute. It may timely file a unit clarification petition or negotiate with the Unions to obtain such changes. If it chooses the latter, however, it must bear in mind that unit description clauses are nonmandatory subjects of bargaining and not subject to impasse privileges. See *New York Times Co*., 270 NLRB 1267, 1273 (1984).

[4] These included instructions to negotiate with the union representing the hotel and restaurant workers, Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO. I issued a decision in that case, Cases 28–CA–10027, 28–CA–10425, 28–CA–10539, and 28–CA–10572 (JD(SF)–144–91) on December 24, 1991. It is currently before the Board on Respondent's exceptions.

[5] Enf. denied 699 F.2d 148 (3d Cir. 1983). Although the court denied enforcement on the facts, it recognized the general rule. Id. at 156.

[6] See also *Carolina Telephone & Telegraph Co*., 258 NLRB 1387, 1388 (1981).

In the earlier case, I commented that even though the contract may have expired at the time the unilateral changes were made, and even if Respondent was entitled to seek a change in the bargaining unit, its purported inappropriateness would not constitute a defense. Based on the court's decision in *Las Vegas Club*, supra, I am now confident that the rule applies not only to unilateral changes, but to a general refusal to bargain as well. The logic is actually the same. Until the Board changes the unit or until the parties agree to change it, it is, and has been, a unit demonstrated to be appropriate for collective bargaining. Therefore, I concluded at both hearings that evidence bearing on the supervisory status of some of the unit members was not relevant to the case and barred it. I continue to adhere to that ruling and again comment that the issue appears to be a red herring. It is of no concern to the outcome of the case. It does not even bear on the remedy, for bargaining unit members are entitled to any remedy appropriate to the unfair labor practices found.

C. *Keiler's Bargaining Tactics*

Attorney and Bargainer Joel I. Keiler testified in Respondent's defense. As noted previously, he had served as Respondent's bargainer in all the meetings with both the Teamsters and the IUOE. The General Counsel has adduced testimony from officials of both Unions regarding what occurred at those meetings as well as describing certain correspondence which was exchanged. The principal bargainers for the IUOE were Business Manager Robert H. Fox Jr. and Business Agents Brian Reive and Michael J. Russell. The principal bargainer for the Teamsters was Secretary-Treasurer (Chief Executive Officer) Richard Thomas. Over the years, Thomas has served as a part-time business agent for the IUOE. Both Unions have enjoyed a close relationship with one another, sometimes sharing office space or being officed in the same building. They certainly keep one another informed of events about which they have a common interest.

Despite their closeness and common interest in obtaining a collective-bargaining agreement with Respondent, the two Unions, in general, bargained separately with Keiler, although on one occasion Thomas did attend for a short period of time at an IUOE bargaining session.

Although the testimony each of the union officials gave is similar and mutually corroborative, to get the full flavor of what they say transpired, it is best to look to Keiler's testimony on cross-examination. The union officials all described Keiler's behavior as hostile, antagonistic, and unreasonably insistent on changing the existing system to conform to the proposal which he had initiated in June. Nonetheless, their descriptions are mild compared to the testimony which Keiler himself gave on cross-examination. I have rarely seen a witness as scornful of both the collective-bargaining process and the Act, specifically as enforced by the Board, as is Keiler. Moreover, his testimony confirms the union officials in the sense that he was excessively hostile to being cross-examined and often disruptive. His principal aim seemed to be to demonstrate that his lawyering skills are superior to those of anyone else. He was not willing to accept his role as a witness and to describe the facts as he knew them.

His responses to the very first group of questions propounded to him by the General Counsel demonstrate the point:

> (By Harris): Mr. Witness Keiler, I believe you testified that the three other unions, the Carpenters, Electricians and Painters, did not file unfair labor practice charges after you implemented the Employer's offer, is that correct?
>
> A. I can't say whether it's correct or not as to what you believe.
>
> [Colloquy among counsel and judge.]
>
> MR. A. KEILER: Your Honor, I object to Counsel's characterization of the testimony.
>
> MR. HARRIS: I am characteriz[ing] this witness in what terms.
>
> . . . .
>
> MR. A. KEILER: If he wants to make final arguments, he can wait and make final arguments here.
>
> JUDGE KENNEDY: Well, now, wait here, Counsel.
>
> THE WITNESS: I object to his splitting infinitives. [Tr. 748–750.]

It can readily be seen that Keiler had no interest in following the General Counsel's question and simply wished to disrupt. His remark about what counsel believes and his objecting to ''splitting infinitives'' was in response to nothing and was simply a gratuitous barb. That kind of conduct continued throughout. At one point the General Counsel wished to show that Keiler has a pecuniary interest in testifying as he had and the following occurred:

> (By Mr. Harris) You're getting paid for the time that you have spent here this morning testifying by the Frontier Hotel, isn't that true, Mr. Keiler?
>
> MR. A. KEILER: I object your Honor. How is this relevant to the issues in this case?
>
> JUDGE KENNEDY: I'll overrule that objection.
>
> THE WITNESS: I hope so, but who knows what's going to happen? We could all be dead tomorrow.
>
> MR. HARRIS: You're going to send a bill to the Frontier Hotel for the time that you spen[d] testifying here this morning, aren't you, Mr. Keiler?
>
> A. Not if I'm dead tomorrow.
>
> MR. HARRIS: Your Honor, would you admonish Counsel—or the witness Keiler to stop parrying with these flip and unresponsive answers.
>
> THE WITNESS: Ask me a silly question, you get a silly answer. [Tr. 757–758.]

At one point Keiler admitted that he ''sometimes'' holds the National Labor Relations Board processes in contempt.[7]

[7] His contempt for the legal process led to a suspension from the practice of law in 1977. See *In the Matter of Joel I. Keiler*, 380 A.2d 119 (D.C. Cir. 1977). There, he had corrupted the arbitral process by secretly hiring his partner as an arbitrator and portraying him as having a Florida address. See also the transcript in *Barbary Coast*, G.C. Exh. 31, where he suggests the National Labor Relations Board is ''unimportant.'' In *Maietta Contracting*, 265 NLRB 1279, 1280 (1982), the Board lists three cases in which Keiler has made groundless accusations against Board personnel, including administrative law judges, and other conduct designed to distract the decisionmakers from the issues raised by the case. In all these cases, his contempt for the process and the Act is apparent. Similarly, he accused counsel for the General Counsel here of misconduct, claiming

Continued

Another example of disruption occurred in this exchange:

> Q. (By Mr. Harris): Now, I believe you testified, and tell me if my belief is correct, if you would, Mr. Keiler—
> A. Well, could we stop it there?
> Q.—if you—no.
> A. Well—
> Q. No.
> A.—I don't know whether your belief is correct or not. I'll answer it right now. So ask me another question. You could ask what I testified to. I'll tell you, but if—when you get into your beliefs, you're always going to get the same answer. I can't answer what your beliefs are.
>
> [Judge gives direction to witness.]
>
> JUDGE KENNEDY: All right. You listen to the question. If you can answer it, answer it.
> THE WITNESS: Yes sir.
> JUDGE KENNEDY: If you can't answer it, then say so.
> THE WITNESS: Okay.
> JUDGE KENNEDY: Let's not interrupt Counsel. Listen to the question. Just because he premises it with ''Is my belief correct that'' and then he is going to tell you what his belief is, you can answer that.
> THE WITNESS: I'd prefer not to. [Tr. 791–792.]

Matters became even worse when Keiler was cross-examined by the Charging Parties' counsel. The Charging Parties' counsel, Goldman, took a more aggressive approach (which was probably not necessary). At one point a relatively good-natured colloquy between Goldman and Alan Keiler drew from Joel the following attack on Goldman while Joel was on the witness stand: ''He [Alan] thinks you're stupider than I do.''

Later, Keiler was asked whether the proposals which were given to each of the Unions were identical except for the classification wage rate and the Union's name.

> (By Mr. Goldman): So it would be fair to say, then, for every bargaining unit, you offered identical contracts except for the classification wage rate for that bargaining unit and the Union's name that covered that bargaining unit, is that correct?
> A. I don't know if it would be fair to say, 'cause ''fair'' is a difficult concept for me.
> Q. Was it accurate—
> A. ''Correct'' is—yes.
> Q. Is it accurate?
> A. It's accurate, and it's correct, yes.
>
> MR. GOLDMAN: I'll get there. It's really hard for me to do it.
> THE WITNESS: Yes, it is. [Tr. 804–805.]

Then Keiler testified with respect to the Teamsters' demand for information from Respondent:

> Q. (By Mr. Goldman): Do you recall the Union requesting information in January, 1991, from—from the Frontier Hotel?
> A. Which Union?
> Q. Teamsters Local—well any union. Do you recall any union asking you for information in January of 1991?
> A. Yes.
> Q. Which Union?
> A. Service Employees, Local 32-B and Local 32-J.
> Q. What did they ask you?
> A. A list of all the employees for the last three years, health insurance payments, sick leave, how much was left. It was about a six-page request.
> Q. And what state was that?
> A. New Jersey. [Tr. 814–815.]

Goldman, unperturbed, then permitted Keiler to describe his behavior with respect to a client in Newark, New Jersey, even though he had been specifically directed to answer regarding the Frontier Hotel in Las Vegas, Nevada. After permitting Keiler to brag about the fact that he had managed under compulsion of a 10(j) injunction, to bargain for 23 sessions in New Jersey without a charge being filed, Goldman managed to bring Keiler back to Respondent and to the request for information filed with it by the Teamsters.

Later, Goldman asked a question regarding whether Respondent's decision to withdraw its private health plan proposals and remain with the Teamsters Health Plan was affected by increased costs to be levied upon the employees. Another disruptive exchange occurred:

> Q. (By Mr. Goldman): Mr. Keiler, during these days, you never heard anything from anybody about the problems of Teamsters 995 plan was having [sic] in the increase in costs that were going to be associated with that plan to the employees?
> A. In which days?
> Q. You're awfully cute aren't you. Cute as a fox.
> A. I'm also not fat.
> Q. You didn't understand my question, did you?
> A. You said ''in these days.'' I don't know what days you're talking about. A couple of years ago I heard there was an insurrection at the Union Hall and some people wanted to kill Dick Thomas. I heard that. That was a long time ago.
>
> [Intervention by judge.]
>
> THE WITNESS: I have—the incident that I heard about with the insurrection at the union hall was at least year before that. I don't —I haven't heard anything, no. The answer is no. [Tr. 825–825.]

Earlier, on direct examination, Keiler described how he had reintroduced himself to Thomas. According to Keiler, he had been a trial attorney for the National Labor Relations

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that he improperly attempted to read papers on Keiler's counsel's table. In fact, all counsel, who needed the aid of crutches to walk due to recent hip surgery, was trying to do was to rise, awkwardly in the narrow space between counsel tables. I have made a conscious effort not to allow this type of conduct to divert me from the focus of the case. While it is important not to make Keiler the main issue of the case, nonetheless, since he was Respondent's sole bargainer, his credibility is a principal concern. His behavior does bear on his credibility and therefore an assessment of his actions and statements cannot be avoided. Suffice it to say that in *Maietta* the Board has already noted that he is prone to make ''disingenuous cries of 'wolf.'''

Board in Los Angeles in 1965. He had apparently tried a case against Thomas' Teamsters Local. He says, when he reintroduced himself at the meeting on August 6, Thomas and his assistant, Billy Carter, represented the Teamsters. Keiler was asked what was discussed at the meeting:

> Well, the meeting opened by my reminding Mr. Thomas that when I was with the Board in Los Angeles in 1965 and we took Las Vegas over from San Francisco, I was the first agent sent out; I had the first trial for Los Angeles; his was my first case; and I beat his ass, and that was the expression I used. He looked at me like I was off the wall. He didn't say anything. There were some other pleasantries like that and then we got into discussing my proposal. [Tr. 717.]

He repeated his testimony again on cross-examination:

> (By Mr. Goldman): And that's the first words out of your mouth when you met Mr. Thomas, from your own memory from 1965 that ''I beat your ass,'' huh?
>
> A. That's pretty close, yes. [Tr. 827.]

Keiler then gave the following testimony with respect to a proposal dealing with eligibility for vacation and holiday pay.

> (By Mr. Goldman): Well, let me see if I understand your 2000 hours. If somebody comes to their anniversary date and doesn't have 2000 hours, they don't get their holidays and vacations prorated?
>
> A. Are you talking about the original proposal or the final that I offered with Mr. Thomas on the Engineers?
>
> Q. Let's talk about the original.
>
> A. Okay. The original was if they didn't [work] 2000 within 12 calendar months—in other words their anniversary year, they lost it. I was willing to give that up.
>
> Q. So just let me see if I understand something. So whereas the State [of Nevada] might require pro rata, you're not willing to give pro rata on [in?] this case, isn't that correct, they lose it?
>
> A. It's not correct. That's was my original proposal. I was willing to give it up, and I gave it up.
>
> Q. Excuse me. Let me ask you about—
>
> A. No. If I've got the choice if you have to ask me if you can ask, the answer is no.
>
> [Intervention by judge.] [Tr. 834.]

During the course of bargaining, Keiler had objected to certain language found in the recognition and definitions clause (art. 1) of the IUOE proposal. In fact that clause was taken verbatim from the expired 1983–1987 contract. (See G.C. Exhs. 4 and 7.) Keiler's objection asserted that the unit definition could not be agreed to because it covered everyone, including guards and supervisors. In fact the literal language of the clause does no such thing. The entire clause is set forth in the footnote below.[8] Mr. Keiler's testimony was:

> (By Mr. Goldman): I believe before the break I asked you a question in regard to Article 1. I would like to direct your attention to Article 1 on page 4 of Respondent's Exhibit No. 11, and with respect to that particular article, which part of that article did you not agree upon?
>
> A. 1.01, 1.02 and 1.03.
>
> Q. Now, can you look at 1.02 for a second and read it to yourself? [Article refers to art. 16.]
>
> Q. Can you look back to Article 16, which is on page—starting page 35? Can you look?
>
> A. I can.
>
> Q. Are you?
>
> A. I'm not, but I can.
>
> Q. Will you?
>
> A. You have a question? Ask me.
>
> JUDGE KENNEDY: He's asking you to look at that other page, sir, so that you can apparently make a comparison.
>
> Q. (By Mr. Goldman): Could you show me where in Article 16 the term ''guards'' [is] used?
>
> A. It's not.
>
> Q. And where, then, do you come—how did you arrive at the writing on the right-hand corner here which says, ''No, includes everyone, guards and supervisors?''
>
> A. By airplane. [Tr. 842–843.]

I think it is clear from the foregoing testimony and behavior that, at the very least, Keiler is a difficult individual. His disrespect for the process is obvious. It appears to me that he has rejected the concept that his conduct is subject to review under the Act. But more than that, he has eloquently described his approach to collective bargaining far better than the union officials could. Their description of his behavior during the bargaining process does not even begin to convey Keiler's eccentric behavior. They nonetheless observed it and were unable to deal with it effectively. In fact, I do not think any person experienced in the collective-bargaining process would be able to conduct a rational bargaining session with an individual whose approach is as surreal as Keiler's. I do not use that description lightly. I find ''surreal'' is an accurate depiction of the way Keiler views and distorts things. He not only regards his conduct as above review, but that it is entirely beyond reproach. Unfortunately, his testimony and attitude simply demonstrate that he has no credibility whatsoever. Even when he is testifying to matters not in serious dispute, one must mistrust him. I am certain that the union officials who dealt with him rapidly recognized that he was not only a difficult individual, but one who is so eccentric that they could not determine how to approach him in a way that would get the bargaining issues resolved.

[8] It reads:

> 1.01 *Recognition*. The Employer recognizes the Union as the exclusive collective bargaining representative for all the employees employed by the Employer in the bargaining unit defined in Section 1.03.
>
> 1.02 *Definition of Employee*. The term ''employee'' or ''employees,'' as used in this Agreement, means all persons directly employed by the Employer to perform work covered by the classifications set forth in Article 16, but excluding all other employees.
>
> 1.03 *Definition of Bargaining Unit*. The term ''bargaining unit'' means the aggregate of all employees (as such term is above defined) employed by the Employer.

D. *The Union Officials' Views*

It will be recalled that the Hotel had been operating under an implemented proposal put into effect on April 25, 1989, for those employees represented by the Teamsters. The IUOE-represented employees were still operating under the terms and conditions as set forth in the agreement which had expired in 1987.

Respondent hired Keiler sometime in May 1990. According to IUOE Business Manager Fox and Teamsters Secretary-Treasurer Thomas, they began receiving telephone calls from Keiler and Federal Mediator Jack Bates at about that time. Keiler was unable to speak directly to Thomas and so left some messages; he did reach Fox on a car telephone. Both told Bates that they were unaware of who Keiler was or what authority he had to speak for the Hotel. Not until July 24 did General Manager Thomas Elardi write the Teamsters a letter advising Thomas that Keiler was in fact its bargaining representative.

In any event, well before that letter was sent, communications of a sort, did begin. On June 27, Keiler sent both unions copies of Respondent's proposed collective-bargaining contract. In the cover letter he states that the federal mediator had been ''unsuccessful'' in arranging a negotiation session and claims that he had called Thomas twice on June 14, once on June 15, and once on June 18 to arrange for a negotiating session. He then asserts that Thomas had ''refused'' to take any of the calls and failed to return any of them. He then said if Thomas did ''not contact me to arrange a negotiating session prior to August 1, 1990 the enclosed proposal will be implemented on August 1, 1990.''

Similarly, he wrote to IUOE's Fox on June 27 again asserting that the mediator had been unsuccessful in arranging a negotiation session and that on June 20 he had called for the same purpose; that on June 25, Fox had returned the telephone call from his car saying that he would need to consult his calendar but ''to date you have not called me again.'' As with the Teamsters, he enclosed a copy of the Hotel's proposal saying, ''If you do not contact me to arrange a negotiating session prior to August 1, 1990, the enclosed proposal will be implemented on August 1, 1990.''

Thomas responded with a letter on July 3, saying he needed to correct some of Keiler's misconceptions. He said that when Bates contacted him, he had agreed to meet but would not do so until he had received something from Respondent advising that Keiler was indeed its representative; that he needed something in writing before any meetings could be scheduled. Moreover, while he agreed that Keiler had called two or three times, it was ''untrue that I refused to take your calls,'' being out of the office each time the call was made. He said on one occasion he returned a call to Keiler's San Francisco hotel only to learn he had checked out.

It is apparent to me, beginning with these first contacts, Keiler was already attempting to lay the groundwork for an accusation that it was the Unions which were failing to meet and bargain. First, by setting a 1-month deadline, it is clear that Keiler was attempting to crowd both unions. Second, they did not know him at all. Third, they did not know what authority, if any, the Hotel had actually given him. Fourth, he did not know the union officials' schedules and there appears to have been no reason to set deadlines at that early point, well before any talking had begun. Finally, the proposal which he sent them was extensive and was an entirely new approach to the parties' collective-bargaining relationship. It described nothing akin to the system under which the two unions and the Hotel were then operating. Keiler undoubtedly knew that it would take a good deal of time for the Unions to digest his proposals and did not wish to give them a great deal of time to do it.

Moreover, Keiler's approach through the Federal mediator is curious. While I am certain that the federal mediator was attempting to be helpful, usually parties do not seek the assistance of the mediator until they have come to some difficult hurdle. I recognize that the parties had not had a contract for about 3 years, but they had reached an operating accommodation. If the Hotel believed that a resumption of negotiations was due, and further believed that a change in its negotiator would be a positive step toward that end, then the appropriate step would have been for the Hotel to advise the Unions that a new negotiator had been hired, tell them his name, and put him in touch. Instead, the Hotel said nothing to the Unions. Keiler knew he was a stranger, and instead contacted the Federal mediator. Those circumstances are quite odd and it seems to be designed only for the purpose of setting the foundation for an argument that it was the Hotel which was operating in good faith by first contacting the mediator. When seen in that light, Keiler's use of the mediator was only a disguise.

Furthermore, the contract proposal which Keiler sent to the Teamsters did not acknowledge the existence of two separate bargaining units. Indeed, its merger of units was a departure from Respondent's recognition of the two units in its implemented terms of April 25, 1989. Keiler offered no explanation for the consolidation.

That in itself is a substantial departure from the good-faith requirement of Section 8(d) of the Act. It is well established that bargaining unit description clauses are nonmandatory subjects of bargaining and may be altered only by mutual agreement. It may be true that the two bargaining units could have been appropriately merged and perhaps there was some legitimate reason for doing so.[9] Keiler, however, did not suggest any and finally, after negotiations did not produce a contract, imposed new terms and conditions on December 1, 1990, which merged the two units. Since the Teamsters never agreed to do so and since bargaining unit description changes may not be accomplished unilaterally, that conduct is virtually a per se violation of Section 8(a)(5) and (1) of the Act. *NLRB v. Southland Cork Co.*, 342 F.2d 702, 706 (5th Cir. 1965); *Hess Oil & Chemical Corp. v. NLRB*, 415 F.2d 440, 445 (5th Cir. 1969), cert. denied 397 U.S. 916 (1970); *National Fresh Fruit & Vegetable Co. v. NLRB*, 565 F.2d 1331, 1334 (5th Cir. 1978); *Newport News Shipbuilding v. NLRB*, 602 F.2d 73 (4th Cir. 1979); and *Bozzuto's, Inc.*, 277 NLRB 977 (1985).

In addition, in its April 25, 1989 implementation, Respondent had continued to recognize the Teamsters exclusive hiring hall although it had modified it to allow for transfers and two outside hires per calendar year.

Almost immediately thereafter, according to Hotel Manager Sydney Woo, he began to ignore the hiring hall requirements. It is true that under the implemented proposal of

[9] But perhaps not. The two groups of employees do not have an obvious community of interest. One uses semiclerical skills, the other physical labor.

April 25, 1989, the Hotel became the sole judge of an applicant's suitability. In addition, it permitted the Hotel to accept or reject any applicant for employment without recourse to the grievance-arbitration provisions which still survived. Woo, apparently relying on those provisions, would not accept any referrals from the Teamsters beginning some time in 1989. Indeed, he began recruiting students employed at the University of Nevada's Las Vegas hotel management school to work at the Hotel in the front end. At no time, however, did he ever notify the Teamsters that he was rejecting the concept of the hiring hall altogether. At one point, he says, he sent some employees recruited from another source to the Teamsters for a referral but says the Teamsters would not give them one. Given the exclusive nature of the hiring hall, that appears to have been an appropriate response, since the Union had not been given an opportunity to refer employees from its waiting list.[10]

Nonetheless, Respondent's practice had the practical effect of changing the bargaining unit membership from employees who had been referred by the Teamsters to employees who had no union connection whatsoever. Furthermore, that union had no real way of knowing what was happening. Neither Woo nor Personnel Director John Patton who had never advised the Teamsters that the hiring hall arrangement had been rejected. As noted, the Hotel's recent implementation of April 25, 1989, was to continue to use it.[11] Thus, Respondent's reversing its field on the point actively misled the Union to think nothing was amiss.

Actual negotiation sessions began with the IUOE on July 27. Keiler had three negotiation sessions with that Union, the second being on September 28, and the last on November 12. He had four meetings with the Teamsters, August 6, September 7 and 27, and October 12.

By the time of the July 27 meeting, IUOE Business Manager Fox had had the opportunity to digest Respondent's proposal of June 27. For four of the five job classifications, Keiler's proposal was to reduce their wages by 52 cents per hour. For the fifth, it was a reduction of 32 cents per hour. This involved about a 5-percent wage cut for most employees. In addition, Keiler's proposal initially proposed 14 paid holidays. At the next meeting, he reduced it to eight. Furthermore, he included a strange eligibility formula for both holiday and vacations. It required an employee to work 2000 hours in an anniversary year to be eligible for both. If the employee failed to work 2000 hours in an anniversary year, however, that employee received neither holiday nor vacation pay. Furthermore, Keiler's proposal eliminated the pension plan and dropped the IUOE health plan in favor of two private plans, optional to the employee, one known as ''Gemini,'' and the other the ''Health Care Plan of Nevada.''

Predictably, Fox was appalled by the proposal. He testified:

> I expressed the view to Mr. Keiler that these proposals were so outlandish and ridiculous, it does not make any sense to us to make such a—such a proposal, that it was literally trashing our labor agreement. There would be no self-respecting labor union that would sign such a document.
>
> He insisted he was serious and this is what he had to have. We went through it to ask for explanations. Asked him, you know—I told him that the only possible purpose of this would be to generate a strike.
>
> We had—the Union had a proposal which we presented to Mr. Keiler. That proposal consisted of the prior collective bargaining agreement with the changes added that we had negotiated with other employers as a result of a 1987 negotiation.
>
> We then asked him how come or if he wanted to generate a strike. Mr. Keiler indicated—he kept referring to ''Tommy'' and up until then I didn't know who Tommy was, but Tommy he explained to me was Tommy Elardi, that that's the way Tommy wanted it, and he'd represent him, and that's exactly the way he wanted it. He wanted—he wanted us to in other words, [to] turn it down and strike and wanted to replace the engineers. He indicated that he would be pleased to get rid of all the collective bargaining agreements, that that was his purpose in getting [making] such a —this kind of proposal.
>
> . . . .
>
> Then I expressed my disbelief any employer could make such a raunchy proposal, and he indicated that Tommy would like to generate a strike and replace our people.

Keiler declined to go through the Union's proposal, saying it was too big to be digested at that time. In large part it was consistent with the expired IUOE agreement, with which he presumably was familiar. His explanation cannot be credited; he was insistent on discussing only his proposal to the exclusion of nearly everything else.

The next meeting was on September 28. Again Keiler advised that Respondent would not consider anything other than its original proposal. The reduction from 14 to 8 paid holidays was made at that meeting. The last meeting occurred on November 12. Once again Fox attempted to find out if Respondent would make any changes. He says Keiler repeated that there were not going to be any changes, saying ''That's what Tommy wants.'' Fox testified that they talked about the term of the agreement, apparently for the a second time, and Keiler told him it did not matter how long the contract was going to be because it could be 1 year, 2 years, 3 years, that the Union could pick its term because there were not going to be any wage increases so contract length would not make any difference.

During this meeting, according to Fox, Keiler said the parties were at an impasse and he was going to implement the June 27 offer. Fox responded the offer was so ridiculous that it was clear Respondent was not bargaining in good faith. He said the Union did not see it as an impasse but as an intent not to negotiate a contract and to force a strike. Fox reports that Keiler continued to make the same remarks about ''Tommy,'' quoting him to the effect that if the Union did

[10] Cf. *Operating Engineers Local 452 (Ralph A. Marino)*, 151 NLRB 497, 500 (1965).

[11] It should be observed here that assuming Woo's complaints about the quality of employees being sent by the Union was somewhat accurate, it is clear that he never discussed it with the Teamsters. Yet, the Hotel, in an effort to get better employees, rejected the hiring hall source altogether without bothering to advise the Teamsters of its concerns or giving that union an opportunity to consider and correct this perceived shortcoming.

not want this contract proposal, it was a simple matter, it should go on strike. Furthermore, he asserted, Tommy had said they were not very good engineers anyway and he would just as soon replace them. Fox says this was a repetition of what had gone on at the previous meetings.

Fox also says Respondent did make one change during the course of that meeting, to withdraw its health plan proposals advising the Union that it would remain in the IUOE's health and welfare plan.

When he was asked whether Keiler referred to the Company's future with the Union, Fox recalled that Keiler repeated Tommy's preference that the Union go on the strike, that there be no collective-bargaining agreement and that he would just as soon have it that way for all the unions.[12]

On November 19, Keiler wrote Fox a letter in which he reaffirmed a statement made at the last meeting to the effect that Respondent would implement its final offer on December 1. As promised, on December 1 that proposal was implemented resulting in wage reductions, loss of the pension plan, and numerous other changes.

Keiler's treatment of the Teamsters was similar. I have already observed that his June 27 proposal did not acknowledge the fact that there were two bargaining units and that at the outset his proposal was flawed. Nonetheless, on August 6 Keiler met with Secretary-Treasurer Richard Thomas. He, like Fox before him, was dismayed by Respondent's June proposal. He says he had never seen anything like it in 35 years as a union representative. During a discussion about the 2000-hour eligibility rule, Thomas says he remembers telling Keiler that it was totally ridiculous and he could not expect anybody to accept a proposal like that. He says Keiler told him, ''Tom don't care. He'd like to have a strike anyway.'' They went on to discuss the fact that Keiler's proposal eliminated the hiring hall, eliminated the daily guarantees, the weekly guarantees, the business agents' visiting privileges, the steward privileges, and the pension plan. Moreover, for both the front and the back end units, Keiler eliminated all the individuals whom he regarded as supervisors. In general, the wages remained the same except for the laborer. Under the Efroymson implementation of April 25, 1989, the laborer had been receiving $11.92 per hour. Under Keiler's proposal that rate was reduced to $6.50.

Thomas says he explained to Keiler that the Teamsters could not accept his discharge language because it was so foreign to what they were used to; that it was very restrictive and did not even call for warning notices. He remembers Keiler saying, ''It means we can virtually fire anybody for anything.'' Thomas responded, ''You know, we're not going to buy this.'' He says Keiler replied, ''Tom don't care. Tom would like a strike. Tom would like to get rid of the unions.'' When Thomas asked Keiler who ''Tom'' was, Keiler responded that Tom was the general manager and ''the guy calling the shots.''

The next meeting was September 7. Because Thomas was unable to attend, two Teamsters business agents, Bill Carter and Steve Burris met with Keiler. Because of a mix-up that morning, those two did not have a counterproposal with them, so the session was adjourned until the afternoon whereupon they presented Keiler with one. Although Keiler roundly protested their supposed unpreparedness, it is hardly enough to constitute misconduct on the Teamsters' part. What is clear is that the Teamsters' counterproposal did not accept the concept of a merged bargaining unit.

The next meeting was on September 27 and was between Thomas, Carter, and Keiler. Thomas testified Keiler told him he had reviewed the Teamsters proposal and replied that he could not agree to any of it. When Thomas pressed him, saying surely there was something Keiler could agree upon, Keiler replied, ''No. The only thing we want to talk about is our proposal.''

Thomas says they went on to discuss the 2000-hour holiday and vacation eligibility issues. They were able to agree on two or three of Respondent's minor points which were close to what the Union was proposing. The agreements involved changing the 90-day probationary period to 30 shifts, jury duty, uniforms and a rolling 2000 hours' eligibility, rather than an anniversary date cutoff.

When the parties returned to discussing the discharge language, Keiler would not move, again saying, ''Tom don't care.'' And, with respect to the hiring hall, Keiler told Thomas, ''Tom don't want a hiring hall. He thinks he can get better off the street than you can provide.'' When Thomas told him that ''would not fly'' and his membership would not accept it, Keiler replied, ''Tom don't care. Tom would like to have a strike. Tom would like to get rid of the unions.''

Keiler also refused to discuss the pension issue saying they were not going to have one. When Thomas told him that a settlement would not be possible without a pension, Keiler's broken record repeated, ''Tom don't care. Tom wouldn't mind having a strike.''[13]

Thomas says at some point during that meeting Keiler asked him to take the proposal back to his membership. When Thomas said he would eventually do so, he added he would not recommend it because it was not going to get a settlement. Again, the response: ''Tom don't care. Tom would like to have strike.''

Thomas testified that on either October 5 or 6 the proposal was given to the membership and by secret ballot the members unanimously rejected it.

Finally, on October 12, the last meeting occurred. Thomas advised Keiler of the membership's rejection and Keiler told him, ''You got this proposal. This is it. This is our last and final. And we don't care if we have a strike or not.'' Thomas says he attempted to discuss some of the proposals but, ''Keiler's position was that that was the last and final; it wasn't going to change. They weren't going to agree to anything out of our proposal, and the people if they wanted a contract, that was it. And if they didn't, they could strike or do whatever they felt like doing.''

Thomas also recalls Keiler saying that if the Teamsters did not accept by November 1, Respondent would implement its proposal. Thomas says he replied he did not believe the parties were yet at an impasse and any implementation would be illegal.

[12] During the last meeting, Keiler did agree to some very minor changes in his proposal including modifying the holiday and vacation eligibility, maintaining the IUOE's health insurance plan, and accepting its shop steward proposal.

[13] It should be noted here that under the Efroymsom implementation of April 25, 1989, Respondent had been paying into the Teamsters pension plan.

Eventually, on November 8, 1990, Keiler sent Thomas a letter. In that letter he said:

> We met on October 12, 1990, and you promised to give me an answer by the end of October 1990 as to whether the union would agree to the Frontier's final proposal. You have not contacted me. Therefore, as of December 1, 1990, the Frontier Hotel is implementing its final proposal.

It should be noted here that Keiler's assertion in the letter that Thomas had made such a promise is specifically rejected. There was no point in Thomas returning to his membership with the exact same offer it had unanimously rejected days before.

On November 19, 1990, however, before Thomas responded, Keiler advised him that Respondent would not, after all, implement its own health insurance proposal, but would continue to contribute to the health insurance set forth in the expired contract, i.e., the Teamsters plan.

On November 28 Thomas sent Keiler a mailgram referring to the November 8 letter, saying he did not consider negotiations to be at an impasse. He requested another meeting. Keiler did not respond and on December 1, 1990, Respondent implemented its proposal, as modified. Curiously, when Thomas called John Patton, the personnel director, to ask him if the offer had been implemented, Patton could only reply, ''Yes. I think so.'' Thomas asked if he could be more specific, but Patton said, ''I'm not sure.'' A few days later Thomas went to the Hotel and Patton gave him a copy of a document which had been in Thomas' own file, Keiler's original proposal containing Thomas' handwritten notes.[14] Patton told him, ''This is what's been implemented.''

E. *Coleman*

James E. Coleman was an engineer who had been hired in 1987. Sometime in 1989 he became the IUOE steward. Principally a maintenance engineer, he served in several capacities. His duties were to perform maintenance in the hotel rooms, such as light plumbing, air-conditioning repair, and a small amount of electrical work. Occasionally he served as a senior watch-relief. At some point in 1990 the chief engineer left and was not replaced. The construction manager, Cosmo Giancola, assumed some of his duties, although he apparently delegated most daily duties to the assistant chief engineer, John Durfee.

As Giancola testified, he is not a person who concerns himself with ''paperwork,'' preferring instead ''only to see that the job gets done.'' To that end, with Patton's concurrence, he created a new job, the multipurpose employee. The multipurpose employee was to perform certain tasks normally done by employees in the IUOE unit. For example, the multipurpose employee was assigned to perform room maintenance such as those duties which Coleman commonly did. Occasionally, the multipurpose employee was asked to perform certain laborer duties, a Teamsters job. Nonetheless, as Patton testified, the multipurpose employee is part of the engineering department and seems to have reported to Durfee or one of his subordinates.

Patton initially testified that the multipurpose employee was created about March 1991. Later he testified, after hearing Coleman's testimony, that the multipurpose employee classification had been created much earlier, perhaps as early as May 1990. He does say that the idea was initially Giancola's and that Giancola had come to him with it. Patton says the job was actually created after he had consulted with Keiler.

According to Patton, Giancola currently hires multipurpose employees at a rate somewhere between $10 and $12 per hour. That rate is between $3.25 and $5.25 less than the least highest paid in the IUOE unit, even under Keiler's June 27 proposal. It is between $3.50 and $5.50 higher than Keiler's proposed laborer's rate under the Teamsters unit; but perhaps commensurate with the $11.92 per hour laborer's rate under the Efroymson implementation.

Coleman did not accept Keiler's suggestion on cross-examination that the first multipurpose employee, Brent Autry, was hired on July 2, 1990, but did agree that he was hired sometime in 1990. At that time, however, Coleman did not know for what job Autry had been hired, believing he had been hired as a laborer. At some point Coleman became aware that Autry was performing multiple tasks, including carpentry, cleaning, and other things. Neither Patton nor Giancola ever told Coleman or any union official of the creation of the multipurpose employee classification before it was actually established. Nor did anyone clearly advise Coleman afterwards; he could only chance upon what Autry or the others were doing.

Although it would be inaccurate to say Coleman was an extremely active steward, he was nonetheless involved in several grievances or complaints. His procedure, however, was not to complain directly to Respondent's officials, but to advise Business Agent Brian Reive and allow the IUOE to proceed as it thought it should. Some of the grievances which he initiated involved removing an apprentice engineer from duty as a lifeguard at the swimming pool, attempting to obtain a no smoking section in the Helps' Hall (an employee cafeteria), and complaining that a laborer (apparently the multipurpose employee) was doing engineers' work. Both Giancola and Patton claim that they were not aware that Coleman was the IUOE steward. Their claimed lack of knowledge cannot be credited.

Moreover, Coleman was the most senior engineering department employee in terms of length of employment. Furthermore, at no time had Respondent's management complained to him that his work was inadequate or that he was somehow failing to perform his job.

Nonetheless, on February 8, 1991, he was laid off. His termination slip shows that layoff was ''reduction in staff due to lack of business.'' It further remarked that it was a ''temporary layoff.'' The slip was approved by Giancola. Coleman appears to have been laid off with several other employees from other departments. Yet, after Coleman was laid off at least three additional multipurpose employees were hired.

Giancola gave conflicting reasons for the layoff. He first asserted that Coleman had been laid off due to a slowdown

[14] How Patton came into possession of Thomas' papers is unexplained. Patton had not participated in a single negotiation meeting. Indeed, Patton's selection as personnel director is most unusual. He had no background in personnel. He had previously been in charge of security at another hotel owned by the Elardis, had served as a private polygrapher and was a retired police officer. His entire career has been in security, a curious background unless one takes the view that he was hired to prepare the Hotel for a lengthy strike.

in business and that he had hoped to recall Coleman within 30 days. He then went on to say that he had selected Coleman because Coleman was the worst engineer on his staff. When he was asked to describe Coleman's shortcomings, he was unable to do so saying he had to rely on oral reports made to him by his subordinates and other employees. At no time, however, had any supervisor ever told Coleman that he had areas of work which needed improving. Indeed, the contrary appears to be true for he was often used as a relief-watch engineer and paid the higher rate which that job entailed.

Furthermore, it is clear that the multipurpose employees regularly performed work that the maintenance engineers did; as noted at least three were hired after Coleman was laid off.

Under article 11 of the expired IUOE contract, the parties had agreed that an employee ''having the longest continuous time of service shall have preference for retaining and regaining employment in case of curtailment or expansion of operations; provided such employee has the ability to perform the work involved satisfactorily.''

Giancola admitted that he had not taken seniority into account and Patton admitted he did not know what Coleman's seniority was, although he says it is his policy to respect the seniority of long-time employees.

F. *The Information Demand*

Lastly, on January 15, 1991, Teamsters Secretary-Treasurer Thomas wrote Patton a letter. He asked for certain information in order ''to intelligently police the current working conditions covering the employees we represent in both the 'front end' and 'back end' . . . .'' He sought the names, addresses and telephone numbers of all front end employees hired since January 22, 1990; the same information for back end employees since May 11, 1990, together with classifications, time in their job, copies of newspaper advertisements, and offerings submitted to universities, colleges, and employment agencies covering both front and back end jobs beginning January 22, 1990.

Patton did not respond, but turned the matter over to Keiler, who, by letter dated January 22, 1991, declined to provide it. He claimed that the information was being requested ''solely for the purposes of an NLRB complaint hearing,'' i.e., the instant proceeding.

IV. ANALYSIS AND CONCLUSIONS

I have previously touched upon some legal conclusions. Specifically, I have found that Respondent's refusal to honor the two Teamsters bargaining units was a per se violation of Section 8(a)(5) and (1) of the Act. In addition, I have observed that Respondent's negotiator, Keiler, did not approach bargaining with an eye towards reaching a collective-bargaining agreement, at least as a factual matter. It will not add much to this decision to once again observe that his entire approach to this matter was to lay the groundwork to argue that the Hotel had reached impasses with both Unions.

Clearly Keiler came to the bargaining table with a proposal which was not designed to reach an agreement. It was, as the General Counsel and both Charging Parties have persuasively argued, extremely regressive and confrontational. Keiler's personal attitude towards the whole matter was one of challenge on the one hand while trying to create evidence of his good faith on the other.

The union negotiators' main problem was that Keiler personally, and also because of directions given him by Respondent's general manager, Tom Elardi, was not about to permit an agreement to blossom no matter what. Thus, nothing which the unions could propose could have resulted in an agreement. Elardi, by his directions to Keiler, and Keiler, due to his own version of reality, could not bargain in good faith. That conclusion is demonstrated not only by Keiler's personal behavior, but also by the manner in which he approached bargaining and by the proposals themselves.

The whole matter was simply a charade. Keiler had been given marching orders by Tom Elardi to go through the motions of collective bargaining in order to force the Unions either to strike and risk losing their jobs or to tame them to such an extent that their representation of employees would be ineffectual. Such an attitude is contrary to the policies of Section 8(d) and Section 8(a)(5) and (1) of the Act and I so find. This was classic surface bargaining. Keiler approached this table with the attitude that it was all take and no give.

It may well have been true that some of the collective-bargaining clauses in the expired contracts warranted modification; it may also have been true that economic conditions were such that wage adjustments were needed. But Keiler at no time ever approached these bargaining tables with the attitude that corrections needed to be made. Instead he went for the jugular by demanding wholesale concessions including abandonment of pension, wage cuts, and total authority over the hiring/tenure process. The latter, of course, would mean that that there would be no oversight available covering discharge of disciplinary matters. He knew that the Unions could not live with those regressions.

Knowing that, his first act was to antagonize one union official by reminding him that 20 years before he had ''whipped his ass'' and then presented a pugnacious and obstructive stance throughout bargaining. Keiler's daring both Unions to strike is almost unbelievable in today's day and age, but the attitude he displayed during the hearing simply underscores the veracity of the union officials on the point.

With respect to the decision to cease using the Teamsters hiring hall, I find that that policy was implemented surreptitiously and that even if it occurred outside the 10(b) period, the Teamsters could not reasonably have discovered it until shortly before they filed the charge. Accordingly, I find that Respondent's unilateral decision to cease using the hiring hall violated Section 8(a)(5) and (1) of the Act. *American Gypsum Co*., 285 NLRB 100, 101 (1987); *Howard Electrical & Mechanical*, 293 NLRB 472, 474–475 (1989). Similarly its ceasing to advise the Teamsters of the employees it was hiring outside the referral system likewise constituted an unlawful unilateral change.

Indeed, the creation of the multipurpose employee job classification was also done semi-secretly. Neither the IUOE nor the Teamsters could find out about it for a period of time. Even if Coleman was somewhat suspicious of the circumstances, he was unable clearly to distinguish between the hiring of a laborer (who was represented by another union and therefore outside his IUOE purview) and the hiring of a new, wholly unknown job classification. Certainly Respondent had no desire to tell either Union what it was doing. Therefore, Section 10(b) offers Respondent no refuge.

Burgess Construction, 227 NLRB 765 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979).

Moreover, it appears to me that the individuals hired for the multipurpose job were in reality maintenance engineers entitled to the higher rate of pay under the expired contract. Even if Giancola sometimes used them in capacities other than those traditionally performed by the engineers, that does not change the fact that they were part of the IUOE bargaining unit. They were engineering department employees performing engineering department work. In essence these persons were hired as part of a secret effort to remove traditional engineering work from the IUOE bargaining unit. That conduct also violated Section 8(a)(5) and (1) of the Act. *Howard Electrical & Mechanical*, supra.

Given the timing of the Teamsters demand for information regarding new hires, coming in January 1991, about 2 weeks after the complaint in Case 28–CA–10606, which alleged hiring hall violations, it is clear that the request for information was indeed aimed to assist the Teamsters and the General Counsel in the presentation of evidence relating to the complaint. The Board has recently held that even if the material sought would have been producible for collective-bargaining or representational purposes, it is not producible as a substitute for discovery. *Union-Tribune Publishing Co.*, 307 NLRB 25 (1992), relying on *WXON-TV*, 289 NLRB 615, 617–618 (1988). Accordingly, I decline to find that Respondent's failure to produce that material violated Section 8(a)(5) and (1) of the Act.

With respect to the claim that Respondent's withdrawal of its Gemini and Health Care Plan of Nevada health insurance proposals, I am unable to concur with the General Counsel and the Teamsters that the withdrawal was a breach of Section 8(a)(5) and (1) of the Act. Respondent has been paying into the Teamsters plan for many years. The trust which operates that plan has not been shown to have been concerned about the lack of a current contract. Nonetheless, there is no reason to conclude that Respondent's decision to remain with the Teamsters plan is somehow unlawful. It is true that the Hotel's plans were encompassed in its proposal which it announced it would implement on December 1. Nonetheless, its decision to stay with the Teamsters plan, coming before implementation, has not been shown to be in bad faith. Section 8(d) mandates in hiatus situations that conditions remain the same until lawful impasse or a new contract. In this case that is all Respondent did with this working condition— keep it the same. I recognize that the Teamsters believe Keiler was simply trying to take advantage of some sort of difficulty which the Teamsters plan was experiencing and which would result in additional monies coming from the employees' own pockets, but I do not think that has been clearly proven. Accordingly, I decline to find a violation where all Respondent did was maintain the existing system of health insurance.

Coleman's Layoff/Discharge

With respect to the so-called layoff of James E. Coleman, I find that it was in fact a discharge and that the discharge violated both Section 8(a)(3), (5), and (1) of the Act. The only way which Respondent can justify choosing him out of seniority is to assert that a good-faith impasse had been reached in the collective-bargaining process with the IUOE. In that event it would be privileged to implement its final proposal, which in this case included a provision deleting the seniority protections. However, because I have found above that Respondent entered into this bargaining process without the desire to enter into an agreement, and that it engaged in bad-faith bargaining throughout, the right to implement the last offer did not exist as no lawful impasse had occurred. *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968). Therefore, Coleman was at all times protected by the seniority clause of the expired contract. That condition of employment had been maintained as a matter of law by Section 8(d) of the Act during the hiatus between agreements. Respondent was not privileged to change that until there had been a lawful impasse. Its departure from the seniority clause in selecting him for layoff/discharge clearly violates Section 8(a)(5) and (1) of the Act. *Phillip Wall & Sons Distributing*, 287 NLRB 1161 (1988).

Moreover, all the elements of an unlawful discharge under Section 8(a)(3) are present. Coleman was a known union activist, being a union steward who had been involved in a number of grievances. Respondent's animus against the union is self-evident from the face of this decision. It desired to get rid of the Union or emasculate it. What better way to disable a union than to see to it that its steward is removed? The factor of timing is also present. The discharge occurred in the middle of an antiunion effort. Moreover, the reasons advanced by Respondent to explain his discharge are inconsistent. He was treated as a ''temporary layoff'' but never recalled until the course of the hearing.[15] He was accused, without any objective support for the accusation, of being a poor employee. The credible evidence shows that he was at all times more than adequate to perform the job. Finally, he is the victim of Respondent's effort to create the multipurpose employee, a job classification which paid a significantly lower hourly wage. That creation, as noted above, was unlawful. Nonetheless, it was more economical to hire multipurpose employees and keep them away from the IUOE, than it was to keep a union steward whose job could be replaced by the cheaper, illegally created classification. Clearly Respondent violated Section 8(a)(3) and (1) when it discharged Coleman. Respondent has failed altogether to rebut the elements of the prima facie case.

IV. THE REMEDY

Having found Respondent to have engaged in certain violations of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action will include rescission of all unilateral changes found herein, a return to the status quo ante, immediate reinstatement of Coleman to his former job, making him whole for any losses he may have suffered, and making whole any employees who were paid at an improper rate, plus interest for any amounts due. Back-

[15] Patton testified toward the end of the hearing that Respondent had just recalled Coleman, apparently after hearing the General Counsel's case involving him. At that time the recall was so recent Coleman had not yet had the opportunity to reply. In addition to appearing to be connected to the evidence, it may also have been connected to the strike which was then underway. Therefore, the recall may simply have been a tactical one to see whether Coleman would join the strike. These issues, of course, must be left for compliance.

pay for Coleman shall be computed on a quarterly basis from date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Other individuals entitled to backpay are those whose pay rates (including holiday and vacation pay, if any) were reduced as a result of Respondent's unlawful imposition of its pay scales on December 1, 1990, and the multipurpose employees who were, in reality, maintenance engineers in the IUOE bargaining unit. Their backpay shall be calculated by adjusting their actual pay to reflect the rate they should have been paid under the IUOE contract, unless a higher rate has gone into effect, in which case the higher rate shall remain in effect. Interest on those amounts shall be computed as in *New Horizons for the Retarded*, supra. In addition, Respondent shall be required to make whole employees by making appropriate contributions to the pension plans in effect at the time it ceased making those payments. *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).[16] It shall continue to make such payments until such time that a new collective bargaining contract is achieved or until a lawful impasse on that subject is reached.

The affirmative action shall also require Respondent, upon request, to bargain in good faith with Professional, Clerical and Miscellaneous Employees, Local 995, affiliated with International Brotherhood of Teamsters, AFL–CIO and International Union of Operating Engineers, Local 501, AFL–CIO in the appropriate bargaining units described in their respective expired collective-bargaining contracts, and if agreements are reached, to reduce them to writing and sign them.

Finally, because Respondent has demonstrated its rejection of the good-faith bargaining obligation imposed upon it by the Act and because it has engaged in artifice to avoid its fundamental obligations under the Act, a broad cease-and-desist order is appropriate. *Hickmott Foods*, 242 NLRB 1357 (1979).

CONCLUSIONS OF LAW

1. The Respondent, Unbelievable, Inc., d/b/a Frontier Hotel & Casino, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Professional, Clerical and Miscellaneous Employees, Local 995, affiliated with International Brotherhood of Teamsters, AFL–CIO and International Union of Operating Engineers, Local 501, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has failed to bargain in good faith within the meaning of Section 8(d) and Section 8(a)(5) and (1) with each of the aforementioned labor organizations by:

(a) Entering into negotiations without any intent to reach a collective-bargaining contract with either Union; having a closed mind regarding what subject matters should be included in a collective-bargaining contract; and by presenting the Unions with proposals which were intended to cause a strike.

(b) Making unilateral changes in the wages, hours, and other terms and conditions of employment of employees in the bargaining units represented by those Unions including:

(i) Abandoning its obligatory use of the Teamsters hiring hall and the rules associated with it, such as giving notice to that Union of the hire of any individual secured from another source.

(ii) Implementing so-called ''last offer'' proposals at times when a lawful impasse has not been reached because it had not bargained in good faith.

(iii) Creating new job classifications to perform work normally done by bargaining unit employees.

(iv) Rejecting the concept of seniority as described in the expired collective-bargaining agreement between it and the IUOE in circumstances where no impasse over that subject had been reached.

(c) Discharging, under the guise of layoff, employees without regard to their seniority rights as set forth in the expired contract governing preference for selection for layoff.

(4) On February 8, 1991, it violated Section 8(a)(5), (3), and (1) by discharging its employee James E. Coleman because of his membership in and activities on behalf of International Union of Operating Engineers, Local 501, AFL–CIO, including serving as its shop steward.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Unbelievable, Inc., d/b/a Frontier Hotel & Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith within the meaning of Sections 8(d) and 8(a)(5) and (1) with Professional, Clerical and Miscellaneous Employees, Local 995, affiliated with International Brotherhood of Teamsters, AFL–CIO and International Union of Operating Engineers, Local 501, AFL–CIO.

(b) Entering into negotiations without any intent to reach a collective-bargaining contract with either Union; having a closed mind regarding what subject matters should be included in a collective-bargaining contract; and presenting the Unions with proposals which are intended to cause a strike.

(c) Without notice and without giving the Unions an opportunity to bargain, making unilateral changes in the wages, hours, and other terms and conditions of employment of employees in the bargaining units represented by those Unions such as:

(i) Abandoning its obligatory use of the Teamsters hiring hall and the rules associated with it, such as giving notice to that individuals have been secured from another source.

(ii) Implementing proposals at times when a lawful impasse has not been reached.

[16] Because the provisions of employee benefit fund agreements are variable and complex, the question of whether Respondent must pay additional sums to the pension fund in order to satisfy the ''make whole'' remedy, shall be left to the compliance stage. *Merryweather Optical Co*., 240 NLRB 1213 (1979).

[17] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(iii) Creating new job classifications to perform work normally done by bargaining unit employees.

(iv) Rejecting the concept of seniority as described in the expired collective-bargaining agreement between it and the IUOE in circumstances where no impasse has been reached.

(d) Discharging employees, in the guise of a layoff, without regard to their seniority rights as set forth in the expired collective-bargaining contract governing preference for selection for layoff.

(e) Discharging or otherwise discriminating against any employee for supporting or acting on behalf of International Union of Operating Engineers, Local 501, AFL–CIO or any other union.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) In the Teamsters and IUOE bargaining units, restore the wages, hours, and terms and conditions of employment to those which were in effect prior to December 1, 1990 (except that any wage rates which now exceed those in effect at that time shall not be reduced).

(b) On request, bargain in good faith with International Union of Operating Engineers, Local 501, AFL–CIO as the exclusive representative of the employees in the bargaining unit described in its 1983–1987 collective-bargaining contract concerning wages, hours, and terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) On request, bargain in good faith with Professional, Clerical and Miscellaneous Employees, Local 995, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of the employees in the ''Front End'' and ''Back End'' bargaining units as described in its 1983–1987 collective-bargaining contracts concerning wages, hours, and terms and conditions of employment and, if understandings are reached, embody those understandings in signed agreements.

(d) Make whole those employees, together with interest as described in the remedy section of this decision, who suffered wage and/or pension losses resulting from the unlawful unilateral changes described herein.

(e) Offer James E. Coleman immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings, plus interest, and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(f) Remove from its files any reference to the unlawful discharge of James E. Coleman and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its hotel and casino in Las Vegas, Nevada, copies of the attached notices marked ''Appendix A'' and ''Appendix B.''[18] Copies of the notices, on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''